IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDGAR M. ELLIS, Appellant, vs. C. J. FITZHARRIS, Superintendent, Correctional Training Facility, Soledad, California, et al., Appellees.	)	No. 21332

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was apparently invoked under Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes an order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

Appellant has appealed from an order of the United States District Court for the Northern District of California, denying his petition for a writ of habeas corpus.

A. Proceedings in the State Courts.

On December 20, 1946, appellant and one John C. Defer were convicted of murder in the first degree, appellant was also adjudged to have suffered two prior convictions. Appellant was sentenced to imprisonment in the State Prison for the term of his natural life. (TR 20, 35).[1/] There was no appeal from the judgment of conviction but, represented by the same attorney who represented him at trial, appellant did take an appeal from an order of the trial court refusing to correct the record relating to the recordation of the jury verdicts. (TR 20). Thereafter, appellant filed petitions for habeas corpus in the Monterey County Superior Court on April 2, 1964, the District Court of Appeal for the State of California, First Appellate District on December 22, 1964, and in the California Supreme Court on or about February 17, 1965 (TR 3-4). The petitions were all denied (TR 4; AOB 1-2).

B. Proceedings in the Federal Courts.

On or about February 12, 1964, application was made to the United States District Court, Northern District of California for leave to file a petition for writ of habeas corpus. This application was denied on the ground

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1. "TR" refers to the transcript of record on the proceedings in the District Court.

that petitioner had not exhausted his state remedies (TR 3-4: AOB 1-2). The instant petition was filed on April 20, 1965 (TR 1; AOB 2).

On June 30, 1965, the Honorable William T. Sweigert, Judge of the United States District Court, issued an order to show cause why a writ of habeas corpus should not be issued (TR 17). The Attorney General's office, representing the respondent herein, filed a return to said order on September 17 1965 (TR 19-34). Petitioner filed his traverse on October 6, 1965 (TR 36-41).

Judge Sweigert issued an interim order on January 12, 1966, inviting petitioner to file a supplemental memorandum in regards the voluntariness issue which was raised in his petition (TR 42-46). Petitioner filed said supplemental memorandum on March 31, 1966 (TR 47-53).

On August 3, 1966, Judge Sweigert denied the petition, discharged the order to show cause and dismissed the proceedings (TR 54-65).

On September 1. 1966, Judge Sweigert granted petitioner's application for a certificate of probable cause (TR 66). Notice of appeal had been filed on August 29, 1966 (TR 68).

APPELLANT'S CONTENTIONS

1. That the court below erred in its determination that the procedural safeguards for the admissibility

of confessions was followed.

2. That the court below erred in its determination that an evidentiary hearing should not be held to determine whether or not the confession was voluntary.

SUMMARY OF APPELLEES' ARGUMENT

I. The decision of the District Court that the complaint of confession was voluntary, based as it was, upon a review of the exhaustive trial proceedings in that regard, must stand, as appellant has failed to show error.

II. The standards of Townsend v. Sain having been met in the instant case, there was no error when the District Court declined to order an evidentiary hearing.

ARGUMENT

I

THE DECISION OF THE DISTRICT COURT THAT THE COMPLAINED OF CONFESSION WAS VOLUNTARY, BASED AS IT WAS, UPON A REVIEW OF THE EXHAUSTIVE TRIAL PROCEEDINGS IN THAT REGARD, MUST STAND, AS APPELLANT HAS FAILED TO SHOW ERROR.

Appellant's first contention on this appeal is that "The Court below erred in its determination that the procedural safeguards for the admissibility of confessions was followed." (AOB 4). However, he fails to state in what manner the court so erred. In his argument (AOB 5-9), appellant chooses to attack the evidence which was before the District Court, and not that Court's adjudication

thereof in its capacity as finder of fact. The argument presented herein is exactly the same (although much abbreviated) as the argument petitioner urged before the District Court, as shown by the petition, traverse, and supplemental memorandum on file. It may have been proper there, but it is improper here.

The sole question on this appeal is the propriety of the District Court's decision predicated, as it is, upon a determination of the issues of law raised by the pleadings, said issues being based upon the uncontested transcript of the trial which resulted in the judgment which is currently being collaterally attacked.

The initial issues raised by the instant petition concerned the alleged inadmissibility of petitioner's confession based upon Escobedo and voluntariness grounds (TR 1-16). The Carrizosa decision (predecessor of Johnson v. New Jersey) disposed of petitioner's Escobedo argument, and on January 12, 1966, the District Court issued an interim order wherein the court asked petitioner for additional argument on the voluntariness issue (TR 42-46). In his supplemental memorandum, petitioner vigorously argued that the standards of Townsend v. Sain, 372 U.S. 293 (1963) and Jackson v. Denno, 378 U.S. 368 (1964), had not been met and that the confession was thereby inadmissible (TR 47-53).

In all his pleadings and memoranda, petitioner relied upon the trial transcript.

The District Court, in this case, did not confine itself to the pleadings and memoranda in making the decision which is the basis of this appeal. Judge Sweigert obtained and carefully studied a copy of the trial transcript wherein is reflected the extensive and exhaustive litigation which occurred relative to the admission into evidence of the confession which is the subject of the instant petition (TR 55). Appellant does not contest the accuracy of this transcript. The only "new" evidence offered by appellant which was not reflected by the transcript is an affidavit, signed by petitioner's parents, that while petitioner was being interrogated, they could not visit him, nor would petitioner be allowed to see an attorney (TR 68). This affidavit was, of course, also before the District Court.

After a review of the arguments presented, and being fully apprised of the facts and circumstances surrounding the taking of the confession and its admission into evidence (TR 54-59), the District Court made the following findings:

(1) The trial judge did make an independent determination of the admissibility of the confession as required by Jackson v. Denno (TR 59-60).

This finding is supported by the trial transcript which shows that while initially the trial judge thought that the determination of voluntariness was exclusively the province of the jury (RT 275-76; TR 55), he subsequently realized his error and acknowledged that he did first have the duty to determine the voluntariness issue (RT 321, 325, 350; TR 55). The court thereupon made an independent determination of petitioner's co-defendant's confession (RT 391-92; TR 55-56). With regard to petitioner's confession, petitioner was placed on the stand, during the presentation of the State's case, specifically for the purpose of testifying that the confession was not freely and voluntarily given (RT 438-456; TR 56-57). Much of petitioner's testimony was contradicted by those involved (RT 233-243, 258-260, 271, 311-312, 323, 337-38, 484-488; TR 57-59). At the close of all the evidence presented on the voluntariness issue, the proposed admission of the confession was objected to by petitioner's counsel. The court overruled the objection and also overruled the subsequent objections made during and after the confession was read (RT 494-495, 539, 541; TR 59).

This uncontested evidence clearly supports the District Court's finding that the trial judge did make an independent determination of the admissibility of the confession.

(2) The fact finding procedure employed by the trial court was adequate to afford a full and fair hearing on the question of voluntariness (TR 60).

This finding is supported by the transcript which shows that the trial judge permitted the defense to introduce all evidence relative to voluntariness during the presentation of the State's case and prior to the judge's ruling on the admissibility of the evidence (TR 59-60).

(3) When judged against the standards of Townsend v. Sain, 372 U.S. 293, 316 (1963), the trial court's determination on the issue of voluntariness is fairly supported by the record (TR 60-65).

This finding is amply substantiated by the transcript when viewed according to the rules applicable to collateral review of evidence in these matters. As the District Court pointed out in its order, the court must, in making this determination, consider only the uncontested portions of the record (TR 61). Culombe v. Connecticut, 367 U.S. 568 (1961).

The uncontested portions of the instant records show that petitioner had been questioned intermittently for approximately six hours on September 3, 1946, and for approximately ten hours on the following day (TR 61). However, he did not then make a statement. When petitioner heard his

co-defendant's confession (found to be voluntary) and went back to his city prison cell for the night to think about it he decided to confess. It was only after this night's rest and reflection - reflection upon his co-defendant's implicating confession - that petitioner decided to make a statement (TR 61-62).

Based upon these facts and upon a review of applicable case law (TR 62-64), the District Court found (TR 65) that the confession was not the product of coercion and that the record fairly supports that finding.

These findings by the District Court cannot be overturned unless they are clearly erroneous. Fed.R.Civ.P. 52(a); United States ex rel. Gates v. Pate, 355 F.2d 879, 881 (7th Cir. 1966); Kelly v. Johnston, 128 F.2d 793, 794 (9th Cir. 1942). Appellant has not shown how the District Court erred. All of the federal cases cited by appellant in his re-argument of the voluntariness issue (AOB 8) were considered, and distinguished by the District Court, as reflected by its order (TR 62-65). The procedure followed by the District Court in making this determination is judicially sanctioned. Culombe v. Connecticut, supra, 367 U.S. 568 (1961) (TR 60-61), and appellant does not dispute its correctness.

Indeed the determination of voluntariness by this

District Court finds support in many cases, in this Circuit and others, and they command an affirmance in this case. See Palakiko v. Harper, 209 F.2d 75, 89 (9th Cir. 1953); Barber v. Gladden, 327 F.2d 101-103-104 (9th Cir. 1964); United States ex rel. Crump v. Sain, 295 F.2d 699 (7th Cir. 1961); Lattin v. Cox, 355 F.2d 397, 399-400 (10th Cir. 1966); United States ex rel. Russo v. State of New Jersey, 351 F.2d 429, 433 (3d Cir. 1965); Smith v. Heard, 315 F.2d 692, 694 (5th Cir. 1963).

II

THE STANDARDS OF TOWNSEND V. SAIN HAVING BEEN MET IN THE INSTANT CASE, THERE WAS NO ERROR WHEN THE DISTRICT COURT DECLINED TO ORDER AN EVIDENTIARY HEARING.

The secondary issue on this appeal is whether the District Court erred in failing to order an evidentiary hearing (AOB 4, 9-10). The standards to be followed in making this determination are set forth in Townsend v. Sain, 372 U.S. 293 (1963). The rule is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if: (1) the merits of the factual dispute were not resolved in these state hearings; (2) the state factual determination is not fairly supported by the record as a whole: (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair

hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearings; or, (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. 372 U.S. at 313.

Since the District Court found, specifically, that the merits of the factual dispute as to voluntariness were resolved at the state hearing, that the fact finding procedure was adequate to insure a full and fair hearing, and that the finding of voluntariness was adequately supported by the record, the only standard of Townsend left upon which petitioner may ground his plea for a hearing is that there is a substantial allegation of newly discovered evidence (TR 54-55). Townsend v. Sain, supra, page 313.

The "new" evidence put forth by petitioner was more than a mere allegation. He caused to be submitted to the District Court as an exhibit attached to his petition (TR 6-8) an affidavit of petitioner's mother to the effect that petitioner's parents were not allowed to visit him while he was being interrogated nor would they allow petitioner to see an attorney. While we doubt that this is "substantial" new evidence on the question of voluntariness,

the point remains that the affidavit is complete in and of itself and that it was considered by the District Court below. There is no suggestion that there is any other previously unheard of evidence which can only come to light in an evidentiary hearing. We think it quite apparent that the District Court had before it all of the evidence which might possibly exist in this matter, and that nothing would be unearthed in a hearing which has not already been presented. Petitioner has not averred otherwise. For this reason and for the further, most important reason that Townsend v. Sain has been complied with, we submit that there was no error committed by the District Court in not ordering an evidentiary hearing.[2/]

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2. In this regard, we would draw the Court's attention to the recent adoption of 28 U.S.C. § 2254(d). This section provides that in a federal habeas corpus case, the state court findings are presumed to be correct, except where certain enumerated circumstances are present.

The purpose of this amendment is to afford finality to state court decisions which result from a fair hearing and which are fairly supported by the record. The drafters of the amendment verbalized this intent by stating that its purpose was to give a "qualified application of the doctrine of res judicata" to federal habeas corpus proceedings brought by state prisoners. H.R.Rep. No. 1892, 89th Cong., 2d Sess. 15 (1966). Furthermore, under this amendment, there is an increased burden of proof - "convincing evidence" - imposed upon the applicant.

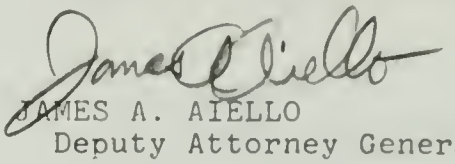
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment should be affirmed.

DATED: January 26, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General



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The decision of the District Court, clearly correct under then existing law, finds further support in this statute, for, even if this judgment were reversed, subsequent proceedings would be governed by 28 U.S.C. § 2254(d), and, since none of the excepting circumstances are present, the findings of the state court would be entitled to a presumption of correctness.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment should be affirmed.

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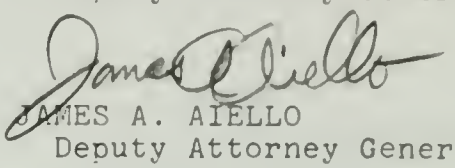

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18. 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: January 26, 1967

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